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IN THE

Supreme Court of the United States

October Term, 1962.

No. 711

NATIONAL BULK CARRIERS, INC., In personam,
And the SS BULKCRUDE, In rem,
Petitioners

V.

MRS. VALERIE JEAN GARDNER, As Administratrix
of the Estate of Robert Edward Gardner, Jr., Deceased,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT GARDNER

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OPINIONS BELOW

The Opinion of the District Court (App. 1-9 of the Petition) is reported at 190 F Supp. 143. The unanimous Opinion of the en banc Court of Appeals for the Fourth

Circuit[1], (per Chief Judge Simon E. Sobeloff) reversing the District Court, was rendered July 31, 1962. A Petition for Rehearing was filed (by Petitioner shipowner here) and on October 26, 1962 rehearing was denied. The en banc Court on the same date amended certain paragraphs of its Opinion previously rendered and filed its Amended Opinion, one member of the Court dissenting. The Amended Opinion of the Court and the dissent is not yet reported but is printed in the Appendix of the Petition at pp. 18-31.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

In this Jones Act (46 USC 688) case, seaman Gardner was sent for to stand watch at 11:30 P. M., December 8, 1958 while his vessel was off the Florida Keys on a voyage from New York to Corpus Christi. He could not be found. Inquiry revealed that no one had seen him since supper at 6:00 P. M. The Master nevertheless kept steaming on his course and speed while a search of the vessel was made which revealed that Gardner was overboard. Reporting this by wireless to the Coast Guard, the Master still continued on and maintained his same course and speed without turning about or making any rescue attempts. He arrived at Corpus Christi on scheduled time two days later. The question presented is:

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1. Argument was first had before a three judge panel on Oct. 10, 1961. The Court thereafter on April 6, 1962 ordered reargument en banc. Title 28 USC Sec. 46 (c) authorizes rehearings en banc when ordered by a majority of the Circuit Judges of the Circuit in active service and the en banc Court consists of all of the active Circuit Judges of the Circuit.

Whether or not the Master is under a duty to use every reasonable means to try to save the life of his crewman overboard in the sea.

STATUTES INVOLVED

The Statutes involved are The Jones Act, 46 USC 688 incorporating by its terms the Federal Employers Liability Act, 45 USC 51.

COUNTER STATEMENT OF THE CASE

This counter statement of the case is deemed necessary in correcting certain substantial and important inaccuracies and omissions in the shipowner's Petition. The deceased seaman Gardner, a crewman of the Petitioner shipowner's vessel BULKCRUDE, left New York with the vessel on December 3, 1958 for a voyage to Corpus Christi, Texas. On December 8th while the vessel was off the Florida Keys, Gardner became ill and the Master relieved him of his noonday 12 to 4 watch. Petitioner's statement (Petition p. 4) that Gardner was ill from drinking is wholly without evidence. Gardner had supper with the rest of the crew at 6:00 P. M. The vessel was steaming at approximately 15 knots per hour through the warm smooth waters around the Florida Keys. There was no wind, the seas were calm and the water temperature was 82° Farenheit. When another seaman went to call Gardner in his room for his midnight 12 to 4 watch he could not be found. Notwithstanding, the Master continued on his course and speed of 15 knots per hour and a search of the vessel definitely revealed that Gardner was not on the vessel and was overboard in the sea. The Master took no action whatsoever but maintained his same course and speed, merely reporting Gardner's disappearance to the Coast Guard, which in turn advised the ships in the

area to be on the lookout for Gardner. In reporting to the Coast Guard the Master failed to give the location of his ship or the track or course traversed since Gardner was last seen at suppertime, 6:00 P. M. The Master made his scheduled time of arrival in Corpus Christi two days later. He admitted that he made no attempt to rescue Gardner nor requested assistance from either the Coast Guard or other ships in the area to look for Gardner. He further admitted that his own inaction in failing to turn around to try to find Gardner precluded any probabilities of saving Gardner's life. Indeed the Coast Guard officer stated that he could not send search planes or ships because the Master had not given his course and position when reporting that Gardner was missing. Both of the shipowner's expert Master Mariner witnesses stated that they would have turned the ship around and retraced the course at least an hour or an hour and a half after the search revealed Gardner was not on board. Gardner was known to be an excellent swimmer and World War II statistics on rescue were introduced showing that approximately 70% of men were rescued after their ships had sunk. Indeed the Coast Guard Rescue Plan showed that the probabilities of rescue within three day's were excellent for a man in warm or tropical waters such as these.

The District Court dismissed the Libel of Gardner's widow holding that the Master's failure to make even the slightest attempt to save the life of Gardner would not render liability unless it were shown that if the Master had made any attempts to rescue, these attempts would be successful. The Court of Appeals reversed holding that under these circumstances where there was a complete failure to even try or attempt to perform the duty to rescue, this amounted to an abandonment of the crewman to his fate and the shipowner was liable.

ARGUMENT

1. THE DECISION BELOW IS CLEARLY RIGHT.

The Fourth Circuit in its often quoted decision enunciating the rescue doctrine in Harris v Pennsylvania Railroad Company, 50 F2nd 866 (1931), held:

> ". . . it is implied in the contract *that the ship shall use every reasonable means to save the life of a human being who has no other source of help.* The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right." (50 F2nd 868) (Emphasis ours)

The shipowner owes his crewman certain positive and affirmative duties, the shirking of which renders the shipowner liable, such as the failure to provide medical treatment, The Iroquois, 194 U.S. 240 (1904); the failure to pay maintenance, Vaughan v Atkinson, ___US___, 82 S. Ct.___, 8 L ed 288, (1962). This Court specifically set forth the positive and affirmative duty of the Master to rescue his crewman in Cortes v Baltimore Insular Lines, 287 US 367, 377 (1932), stating:

> "There is little doubt that rescue is a duty when a sailor falls into the sea, United States v Knowles (D. C. 4 Sawy. 517 Fed. Cas. No. 15,540, and that a liability to respond in damages is cast upon the shipowner if he is abandoned to his fate. Harris v Pennsylvania R. Co., (CCA 4th), 50 F (2nd) 866, supra."

These duties admit of ". . . no merely perfunctory discharge," DeZon v American President Lines, 318 US 660, 667 (1942). When these affirmative duties are shirked or

disregarded by the shipowner, liability must be imposed. If the shipowner could escape liability when its Master has done absolutely nothing for his crewman in distress, this would render the positive duty to rescue nugatory. Cf. Vaughan v Atkinson, __US.__, 82 SCt.__, 8 L ed 288 (1962). The Court of Appeals was clearly right in imposing liability here where the Master totally failed to make even a try to rescue but abandoned Gardner to his fate.

The Petitioner shipowner gives as a reason for granting certiorari that the Court of Appeals ignored the decision of this Court in McAllister v United States, 348 US 19, 75 S Ct. 6, 99 L ed 20 (1954) holding that the Court of Appeals should not set aside the District Court's findings of fact, unless they are clearly erroneous. McAllister further held however that "a finding is clearly erroneous when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (348 US 20). But the facts in this case are not in dispute. The District Court did not have to weigh or make a choice between conflicting facts and thereupon make a finding. The shipowner concedes and admits that the Master did not make the slightest effort or attempt to try to rescue or save the life of his crewman, and the shipowner's own expert Master Mariners recognize the duty to turn the ship around and try to search for and try to rescue Gardner. Indeed the District Court stated in its Opinion that "admittedly, in the present case, the Master of the vessel did nothing by way of search for the missing man overboard other than to notify the Coast Guard." (App. p. 6 of Petition) Further, Chief Judge Simon E. Sobeloff of the Fourth Circuit, in both the original and amended Opinion of the en banc Court, after reciting the details of the Master's inaction, stated that: "These facts are not in contro-

versy." (App. pp. 9, 10, 18, 19 of Petition.) Even the Petitioner shipowner itself on page 4 of the Petition states:

> "Basically there was little conflict in the testimony offered on behalf of libellant and respondents."

We do not have here a case where the Court of Appeals has overturned the District Court's findings of fact nor substituted its own findings for that of the District Court. The decisive question on appeal was, "What was the Master's duty under the circumstances of this case" (App. p. 22 of Petition) which is an issue of law, and the Court held that the Master had failed in his duty to rescue reversing the District Court for exonerating the Master. Further the Court held that the District Court was in error in its basic assumption or conclusion (completely without inference in the evidence) that Gardner went overboard soon after he was last seen at suppertime, 6:00 P. M. and that rescue would not be successful.

On the contrary the Petitioner shipowner even stipulated at trial that it had no knowledge when Gardner went overboard. In fact he could have gone overboard just prior to the search for him at 11:30 P M. or during the search when the Master had positive knowledge of his disappearance but notwithstanding he continued on steaming at his same speed of 15 knots separating Gardner from his only means of rescue.

Where there is no dispute as to basic evidentiary facts (such as the Master's total inaction here) the Court of Appeals may review an assumption or conclusion of the District Court (such as Gardner being overboard at 6:00 P. M.) free from restraint of the "clearly erroneous" rule. Faks v. Taylor, 239 F2nd 224 (5th Cir. 1956), cert. den. 353 US 936, 77 SCt. 812, 1 L ed 2d 759; Gediman v. An-

heuser Busch, Inc., 299 F2d 537 (2d Cir. 1962); Automotive Devices Co. v. Automotive Devices Co. of Pa., 292 F2d 663 (3d Cir. 1961).

On the other hand if it should be thought that there were material conflicts in the evidence which the District Court had to resolve and make a finding thereon, then it is quite clear that the en banc Court of Appeals consisting of five Circuit Judges regarded the District Court's findings as clearly erroneous or even though such findings were supported by evidence, the Court was left with a definite and firm conviction that a mistake had been committed by the District Court, giving them the right to reverse the District Court under McAllister v. United States, 348 US 19, 75 S. Ct. 6, 99 L ed 20 (1954). And indeed on the Amended Opinion there remained four Circuit Judges including the Chief Judge who were firmly convinced of the error of the District Judge although one Judge changed his vote on filing the amended opinion. But the dissenting Judge agreed with the majority on the positive duty of the Master to use all means to effect rescue. He also agreed that the burden ought not to be on the widow to show that the seaman was alive and would have been saved by a reasonable rescue effort.

The Court of Appeals heid that the Master's failure of duty contributed to Gardner's death and that he took the chance or risk of Gardner's drowning when he abandoned him without the slightest effort to save him. The Petitioner shipowner claims that the burden of showing causation has been placed on him. The same claim was made without success where a Master failed in an analogous positive duty to provide medical attention in The Iroquois, 194 US 240, 247, 48 L ed 955, 960 stating:

> "To put it in a light most favorable to the master, he speculated upon the chance that the union of the

> bones had taken place, without seeking to inform himself of the fact. The courts below held that the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libellant imposed upon him."

The Master in this case should not be exonerated from his failure to perform his positive duty to try to save the life of his crewman overboard. The Master should not be allowed to steam on in the comfort of his cabin leaving his crewman helpless in the sea.

II. THERE IS NO CONFLICT OF DECISIONS NOR IMPORTANT QUESTION OF FEDERAL LAW REQUIRING REVIEW

The Petition is not satisfying in showing that this case comes within the classes of cases which may be reviewed as set forth in Supreme Court Rule 19. Petitioner shipowner claims that this case is in conflict with the Fifth Circuit decision in Barrios v. Waterman S. S. Corp. 290 F2d 310 (1961) and the Second Circuit decision in Miller v. Farrell Lines, Inc., 247 F2d 503 (1957). Both of these cases were considered by Chief Judge Simon E. Sobeloff in the en banc opinion (App. p. 22 n. 2 of Petition) of the Court of Appeals. Neither were helpful to the Court nor relevant to this case since they turned on their own particular facts and were primarily tried on grounds other than this case.

For example in the Barrios case, supra, the District Court's Findings of Facts and Conclusions of law (App. 1) show that liability was claimed because of negligence of the ship in causing the deceased to fall overboard. In the Court of Appeals for the Fifth Circuit the failure to rescue doctrine was claimed for the first time but not

seriously relied on, as the Court states in it's opinion (290 F2d 311) that the appellant's primary argument was negligence in not having a bow watch. Further the Court states that the vessel ". . . at that time was encountering very heavy weather, with winds of gale force and was unable to return to search for the missing seaman" (290 F2d 311).

In the instant case it is admitted that the vessel was in tropical waters off the Florida Keys, with calm seas and no wind which were ideal conditions for rescue. It is impossible for the Petitioner to raise by comparison any conflict of principle between this case and Barrios, supra, to warrant review by this Court.

Petitioner claims that this case is also in conflict with the Miller case, supra. But the Miller case was tried on the ground the ship failed to restrain and prevent the seaman from committing suicide. (247 F2d 503, 506). Advancement of this ground for liability destroyed any theory of failure to rescue as Chief Judge Simon E. Sobeloff pointed out in the Opinion below (App. 22 n. 3 of Petition) " . . . the Court declined to presume in such circumstances that he changed his mind and could have been saved by a reasonable search." Nevertheless in Miller, supra, the Master turned the ship around and made a frantic seven hour search although the seaman was first missed eleven hours after he had last been seen. We have no inferences of suicide in the instant case and the evidence was quite to the contrary.

Where the Courts of Appeal are not in conflict in applying proper principles and standards, just because the decisions are different on their particular factual situations, this does not bring such decisions within Supreme Court Rule 19, which may be regarded for review by the Supreme Court.

Additionally the Petition fails to show the importance of any issue of Federal law which would necessitate review. There is no contention made as to the interpretation or application of the Jones Act, 46 U. S. C. 688 under which this libel was filed. It cannot be contended that the duty to rescue has not been fully recognized and enforced for many years. While important to the parties here, this decision decides nothing new or important to anyone else as the obligation to attempt a rescue of the ship's crew is universally known as a legal duty.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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